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No. 95-435

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JOSEPH BATTLE,

Petitioner,

v.

DUKE UNIVERSITY, H. KEITH H. BRODIE, THOMAS R. KELLER, and RICHARD STAELIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether petitioner's claim under 42 U.S.C. § 1981 was correctly dismissed under *Patterson v. McLean Credit Union*, where respondents allegedly failed to perform an employment settlement agreement in retaliation for petitioner filing charges with the Equal Employment Opportunity Commission.

II. Whether petitioner's conspiracy claim is moot, and if not, whether the Supreme Court should either abolish the intracorporate conspiracy doctrine or decide that petitioner's conspiracy claim under 42 U.S.C. § 1985(3) was correctly dismissed where there was no allegation that the individual defendants acted outside the scope of their employment.

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RULES

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PROCEDURAL HISTORY

Petitioner Joseph Battle ("Battle") filed a five-count complaint against Duke University ("Duke"),[1] H. Keith H. Brodie ("Brodie"), Thomas F. Keller ("Keller") and Richard Staelin ("Staelin")[2] (collectively referred to herein as "Duke") in the United States District Court for the Middle District of North Carolina in October, 1990. Count I alleged that, by retaliating against him, Duke violated Battle's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988 & Supp. V 1993) ("Title VII"). Count II, also based on the same alleged retaliation, claimed a violation of Battle's rights under 42 U.S.C. § 1981 (1988 & Supp. V 1993) ("§ 1981"). Count III alleged a conspiracy among Duke, Brodie, Keller and Staelin to deprive Battle of his civil rights in violation of 42 U.S.C. § 1985(3) (1988) ("§ 1985"). Count IV alleged a violation of the North Carolina unfair and deceptive trade practices statute, and Count V alleged that Duke breached an October, 1987, Settlement Agreement ("Agreement") signed by Battle and Duke. The district court granted Duke's motion to dismiss Counts II, III, IV and to dismiss the individuals from the breach of

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1/ Pursuant to Rule 29.1, Duke University states that it has no parent companies or non-wholly owned subsidiaries.

2/ Brodie was then President of Duke, Keller was (and is) the Dean of the Fuqua School of Business, and Staelin was an Associate Dean of the Fuqua School. As Battle's complaint correctly contended, each was an employee of Duke. J.A. 4, ¶¶ 5-8. (References to "J.A." refer to the Joint Appendix which accompanied the briefs filed in the Fourth Circuit. "A." refers to Petitioner's Appendix.)

contract claim. A. 52-66. Following discovery, the district court also granted Duke's motion for summary judgment on Count I, finding that Battle's Title VII claim was untimely. A. 49. The Court dismissed Count V without prejudice, giving Battle leave to refile in state court. A. 50.[2] Battle appealed to the Fourth Circuit, claiming error in the dismissal of Counts I-IV. On May 15, 1995, the Fourth Circuit affirmed the district court on all counts. A. 1-10. On June 12, 1995, the Fourth Circuit denied Battle's Petition for Rehearing with Suggestion for Rehearing In Banc. A. 67-68. On September 11, 1995, Battle served his Petition for Writ of Certiorari ("Pet.").

BACKGROUND FACTS

Duke hired Battle in 1970 as an Associate Professor with tenure in the Fuqua School of Business. In the early 1980's, he made various allegations of racial discrimination. Contrary to Battle's assertion, Pet. 8, the only faculty grievance committee to hear his claims of discrimination rejected them. A subsequent arbitration proceeding between the parties in 1983 was challenged in the district court by Duke in 1984. Battle is again incorrect in his assertion that the court "in effect" found that Duke had discriminated against Battle. Pet. 10. Instead, noting that Battle had engaged in *ex parte* communications with the arbitrator, the district court vacated the arbitration

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[2] Battle subsequently filed a breach of contract case in the North Carolina Superior Court of Durham County, which has since granted Duke's motion for summary judgment, dismissing the complaint with prejudice.

proceeding virtually in its entirety, holding that the *only* issue that the arbitrator had the power to decide was the issue of "past inadequate salaries." *Duke Univ. v. Battle*, No. C-84-213-D, Memorandum Opinion 13 (M.D.N.C. Oct. 1, 1984), attached to Brief of Appellees, *Battle v. Duke*, No. 93-2128 (4th Cir.), Addendum 5-19. All of the other matters decided by the arbitrator, including the existence of alleged racial discrimination, were not properly the subjects of the arbitration and thus "[t]he remainder of the award [was] set aside." *Id.*, Addendum at 17.

In 1986, Battle again complained of racial discrimination by Duke and filed a charge with the Equal Employment Opportunity Commission ("EEOC"), which the EEOC dismissed. J.A. 26-29. In an effort to resolve, finally, all of Battle's claims against Duke, the parties signed the Agreement in October, 1987. J.A. 30-36.

The Agreement, in pertinent part, provided that Duke pay Battle certain sums both at the time the Agreement was executed and in monthly installments, beginning on October 1, 1987, and ending on June 30, 1995. J.A. 30-31. The Agreement provided Battle with office space "generally comparable" to the space he had occupied previously, but that space could be located in any building at Duke. J.A. 32, ¶ 9. Duke further agreed to provide Battle a computer with certain specific features, and to designate Battle "Professor of the Practice of Business Administration." J.A. 32-33, ¶¶ 7, 9. The Agreement contained a confidentiality provision that the terms and conditions of the

Agreement "shall not be disclosed or commented upon in any manner by Battle." J.A. 34, ¶ 12.

In consideration of the foregoing undertakings by Duke, Battle agreed to go immediately on "personal leave of absence without employment duties, responsibilities or obligations of any sort," and Battle agreed that all "employment compensation and eligibility to participate in any fringe benefit program offered by Duke shall terminate and cease forever." J.A. 32, ¶ 6. In addition, Battle agreed to retire officially on October 27, 1990, at which time Duke would designate Battle as Professor Emeritus of the Practice of Business Administration. *Id.* at ¶ 8.

The Board of Trustees approved Battle's new rank of Professor of the Practice of Business Administration on November 6, 1987. J.A. 136-37, 278-79. Duke also made the initial payment and the substantial monthly cash payments to Battle called for under the Agreement -- payments that Duke undisputably made until its obligation to do so ended in June, 1995.

Nevertheless, shortly after signing the Agreement, Battle started to complain about Duke's performance. He complained that his promotion was not announced. J.A. 283. Duke replied that the Agreement did not call for such an announcement, nor was it Duke's practice to routinely make them. J.A. 30-36, 127, 130-33, 150-53. Battle complained that he no longer had secretarial or research assistance, but Staelin told him that University policy was not to provide such assistance to those on leave unless a

faculty member "was actively engaged in research, teaching, and service activities for the business school." J.A. 284. Battle had no such duties under the Agreement. Battle was also upset that Brodie allegedly told some black Duke faculty that Battle was ending his relationship with Duke, J.A. 256-58, 262, even though Battle himself had earlier told a third party that he was leaving Duke. J.A. 239-45, 260-61. Battle complained about his office being moved to the Perkins library, although he admitted that the office was bigger with a beautiful view of the campus. J.A. 255. He also complained that his computer did not work. Duke then agreed to furnish Battle a new computer according to Battle's specifications. J.A. 286-87. Although he was twice notified that the new computer had arrived, Battle never called to arrange a time for delivery. J.A. 177-80, 309, 465-66. Battle also made complaints that his mail was not being delivered properly at Perkins, but he never bothered to establish a mailbox as instructed. J.A. 264-65, 314-16, 321-23. Finally, Battle complained he had been left out of certain directories, J.A. 324-26, although he admits he did not know the criteria for being listed in any of them and that he was still included in many Duke publications. J.A. 266-77.

Despite Duke's efforts to deal with this unending stream of demands and complaints, Battle apparently remained unsatisfied. On April 6, 1990, Battle filed another complaint with the EEOC, claiming that Duke had failed to perform certain terms of the Agreement. J.A. 37, 194-95. Battle also claimed that he had been retaliated against for filing his first EEOC charge in January, 1986. *Id.* The EEOC

dismissed the second charge on July 10, 1990. J.A. 40. On October 9, 1990, Battle filed suit in district court.

SUMMARY OF ARGUMENT

There is nothing to justify the granting of certiorari in this case. It involves the application of settled legal principles to run-of-the-mill facts on claims which have been waived and are moot.

Claiming that there is an open question whether *Patterson* precluded a cause of action under § 1981 for retaliation, Battle contends that the district court and the Fourth Circuit erred in dismissing Count II of his complaint. This case, however, presents a straightforward application of *Patterson* because all the conduct of which Battle complains is postformation conduct which *Patterson* clearly held was no longer actionable. Nor is there any "misapplication of *Patterson*" in the circuits, Pet. 34, which have consistently held that the right to "enforce" a contract applies to *private* enforcement efforts, and not the filing of charges with the EEOC. Finally, the arguments which Battle raises now were never raised before the district court and/or the Fourth Circuit, and he has thus waived them.

Battle also argues that Count III, his conspiracy claim, should survive. However, his claim is moot as he has failed to establish any underlying deprivation of his civil rights. Moreover, even if Battle could establish an underlying civil rights claim, his § 1985 claim also fails because the intracorporate conspiracy doctrine mandates dismissal. Battle argues that this

Court should abolish this doctrine as it applies to civil rights cases, but he provides no persuasive grounds for overturning such a longstanding majority rule in the circuits. He also contends, incorrectly, that the lower courts misapplied the facts and the law in dismissing Count III, but those courts followed well-established precedent in ruling that a corporation cannot conspire with itself, and Battle did not plead any of the exceptions to the rule. The Court should deny the petition for certiorari.

ARGUMENT

I. THE DISTRICT COURT AND THE FOURTH CIRCUIT CORRECTLY APPLIED *PATTERSON*

Conceding that he has no cause of action under § 1981 for certain postformation conduct, Battle nonetheless asserts that his complaint is not precluded by *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), for two reasons. One, Battle now contends that Duke would only enter into the settlement agreement on discriminatory terms, and, two, Battle now contends that Duke interfered with his right to "enforce" the contract. Battle, however, did not plead facts which would give him a cause of action under either of these two new theories, nor did he properly raise these issues below, and thus he has waived them.

A. Duke's Alleged Postformation Conduct Is Not Actionable Under § 1981

Regardless of what label Battle now places on Duke's alleged conduct, it is not actionable under § 1981 as interpreted by this Court in *Patterson*. *Patterson* clearly precludes Battle's § 1981 claim because that statute is restricted to

> forbidding discrimination in the "***mak[ing] and enforce[ment]***" of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief. ***Section 1981 cannot be construed in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts.***

491 U.S. at 176 (emphasis added). The right to "make" a contract concerns only preformation conduct. *Id.* Section 1981 has no application "to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." *Id.* at 177. Further, the right to "enforce" a contract has a very limited application, applying only to private conduct which impedes access to the legal process. *Id.*

Despite the clear language of *Patterson*, Battle claims that Count II survives. He contends that the district court read the complaint too narrowly, ignoring

the fact that Battle alleged that Duke was motivated both by retaliation and by racial discrimination. Pet. 29-30. For purposes of § 1981, however, this is a distinction without a difference.[4] Regardless of defendants' alleged motivation, the fact remains that Battle is complaining about postformation conduct that is not actionable. The plain words of the complaint confirm this fact. The complaint alleged that Duke did not *perform* the Agreement to Battle's liking:

> 21. ***Since the signing of the October 21, 1987 agreement***, however, Defendant Duke University has breached said agreement, and Defendants Duke University and the individual Defendants, H. Keith H. Brodie, Thomas F. Keller, and Richard Staelin have individually and in concert, conspired to and have retaliated against Dr. Battle for his complaints of racial discrimination in employment and retaliation.
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> 22. ***Since the date of the October 21, 1987 agreement***, Duke University has delayed and frustrated the performance of Duke University's obligations pursuant to said agreement....

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[4] *See, e.g., Carter v. South Central Bell*, 912 F.2d 832, 840-41 (5th Cir. 1990) (litigating difference between retaliatory and discriminatory motives is pointless exercise), *cert. denied*, 501 U.S. 1260 (1991).

J.A. 8-9 (emphasis added). The complaint went on to allege that Duke moved Battle's office to a location he did not approve, gave him an inadequate computer, did not deliver his mail as he wanted, failed to list him in various Duke catalogs and did not properly recognize and announce his promotion. *All* of these alleged wrongs occurred *after* the signing of the relevant contract, *i.e.*, the 1987 Agreement.[5/] Thus, all of these actions are postformation conduct; as the district court correctly found, the alleged discrimination that Battle complained of "involves retaliation and post-formation conduct and is not, therefore, covered by § 1981." J.A. 57.

B. Battle Never Pled Facts To Support A Claim That Duke Would Only Enter The Settlement Agreement On Discriminatory Terms

Not until Battle reached the Fourth Circuit did he raise the argument that Duke would only settle on discriminatory terms. *Patterson*, in relevant part, states:

[5/] The Agreement (which was attached to the complaint and incorporated by reference) bought out Battle's tenure and ended all his teaching responsibilities, duties and benefits as of October, 1987. In exchange for compensation and certain other amenities, Battle released Duke from all claims arising prior to the Agreement. Since Battle is not seeking to set aside the Agreement, the district court properly considered only those events which transpired after its effective date.

> The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.

Patterson, 491 U.S. at 176-77.

Battle neither pleaded nor argued this theory before the district court.[9] Instead, in his complaint and his briefs, Battle argued that his claim was one of retaliation that he believed should be actionable under

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[9] Because Battle did not raise this issue in the district court he has waived it. *Domino Sugar Corp. v. Sugar Workers Local 392*, 10 F.3d 1064, 1068 (4th Cir. 1993); *Bakker v. Grutman*, 942 F.2d 236, 242 (4th Cir. 1991); *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (appellate courts generally do not "consider an issue not passed on below[;]" this prevents unfair surprise and would interfere with opposing party's right to offer defenses and other evidence).

§ 1981 because *Patterson* was wrongly decided and Congress was, at the time, considering legislation to overturn it.[7] The complaint, however, made no allegations that Duke would only enter into an agreement with Battle on terms which differed from terms offered to white faculty members. Instead, Battle complained that Duke did not perform its obligations under the Agreement. *See* J.A. 8, ¶¶ 22-26. This failure to perform, according to Battle, was "motivated by race discrimination," and was "committed wilfully and wantonly and in retaliation for Plaintiff's other charges and complaints of discrimination." J.A. 9, ¶ 26. Regardless of the label, all of this is an allegation of postformation conduct, which is not covered by § 1981. *Patterson*, 491 U.S. at 177. Further, Battle was not, as he stated, left without redress for the wrongs he alleged. Pet. 34. As *Patterson* pointed out, postformation contract claims are actionable under Title VII and state contract law. Battle pursued both.

C. Battle's Filing Of EEOC Charges Is Not An Enforceable Contract Right Under § 1981

Despite Battle's attempts to create a contrary impression, there is no confusion in the circuits as to when a cause of action arises under *Patterson* for interfering with a party's right to "enforce" a contract. *Patterson* states that:

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[7] Congress subsequently overturned *Patterson*, but that legislation has no effect on this case.

> [Section 1981] covers wholly ***private*** efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, in enforcing the terms of a contract.

Patterson, 491 U.S. at 177 (emphasis in original). The circuit courts have consistently applied *Patterson* to allow a cause of action when a contract -- not a statute -- has given a party a legal remedy that an employer has interfered with. *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 493-95 (6th Cir. 1992) (plaintiffs allowed to proceed under § 1981 for alleged retaliation because plaintiffs insisted on their contract rights under their grievance process), *aff'd on other grounds*, 114 S. Ct. 1510 (1994); *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1471-72 (7th Cir.) (plaintiff stated cause of action under § 1981 because he alleged that he was denied complete access to the equity review procedures for grievances and lay-offs), *cert. denied*, 114 S. Ct. 419 (1993); *Daniels v. Pipefitters' Ass'n Local Union No. 597*, 945 F.2d 906 (7th Cir. 1991) (because collective bargaining agreement contained an express non-discrimination clause with regard to its referral system, plaintiff stated cause of action under § 1981 for employer's interference with enforcement of that right), *cert. denied*, 503 U.S. 951 (1992).

The circuit courts have just as consistently refused to extend *Patterson* to instances in which the employee alleges retaliation based on the filing of an

EEOC charge. *See Carter v. South Central Bell*, 912 F.2d at 840[8] (employee had no cause of action under § 1981 for retaliatory termination because, in part, filing of an EEOC charge is right given by statute, not employment contract, and thus "right to enforce his employment contract was not impaired"); *McKnight v. General Motors Corp.*, 908 F.2d 104, 112 (7th Cir. 1990) (rights under antidiscrimination laws are not contract rights, thus plaintiffs did not have a § 1981 cause of action because of alleged retaliation for filing a complaint with state civil rights commission and state court), *cert. denied*, 499 U.S. 919 (1991); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1520 (11th Cir. 1991) (*Patterson* precludes a claim for retaliatory or discriminatory discharge after filing of EEOC charge); *see also Williams v. KETV Television, Inc.*, 26 F.3d 1439 (8th Cir. 1994) (no § 1981 claim based on allegation that employee treated differently after filing an EEOC claim).

In the instant case, the district court and then the Fourth Circuit followed *Patterson* and its own subsequent precedent, *Williams v. First Union Nat'l Bank of N.C.*, 920 F.2d 232 (4th Cir. 1990), *cert. denied*, 500 U.S. 953 (1991), in ruling that Battle had

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[8] Battle seems to suggest that there is some split in the Fifth Circuit on claims of retaliation under § 1981. *See* Pet. 20 n.4. Although the court's opinion in *Steverson v. Goldstein*, 24 F.3d 666 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 731 (1995), is less than clear, it is abundantly clear that the court did *not* decide the case based on whether or not plaintiff had a retaliation claim under § 1981. 24 F.3d at 670 and n.7.

not stated a cause of action.[9] The only legal right that Battle can claim was impaired was the filing of two complaints with the EEOC after the signing of the Agreement. As shown above, ***none*** of the circuit courts which have subsequently applied *Patterson* have allowed a § 1981 claim to proceed when the right alleged to be impaired is the filing of an EEOC complaint.

Battle overstates the "clear[] ... difference of opinion in the circuit's regarding the contours of retaliatory conduct which remains actionable under ... *Patterson*...." Pet. 28. As shown above, the circuit courts have consistently applied *Patterson* as it concerns the enforcement of contracts. Battle, however, ignores the difference between a contractual right and a statutory right, and the "difference of opinion" that he portrays is created out of whole cloth. For example, the Seventh Circuit's "struggle," Pet. 21, is nonexistent.[10] In *Mozee v. American Commercial Marine Servs. Co.*, 940 F.2d 1036 (7th Cir. 1991), *cert. denied*, 113 S. Ct. 207 (1992), the court recognized that

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[9] In fact, the "enforcement" argument which Battle raises as grounds for petitioning this Court for certiorari was raised only in passing before the district court, was not raised at all on appeal, and has thus been waived.

[10] Battle likewise tried to create the impression that this Court had already suggested in *Lytle v. Household Mfg.*, 494 U.S. 545 (1990), that retaliation claims were still actionable after *Patterson*. Pet. 19. In *Lytle*, however, this Court specifically did not address the effect of *Patterson* because it was "not even remotely related to the question on which we granted certiorari." 494 U.S. at 551 n.3.

retaliation for enforcing a contractual -- not statutory -- right would give plaintiffs a § 1981 cause of action, but found that there was no evidence of any interference with a contractual right. In *Bailey v. Northern Indiana Public Service Co.*, 910 F.2d 406 (7th Cir. 1990), the court held that the only claims that could possibly survive were those that could meet the "new and distinct relation" test applied to promotions. The court specifically did not decide whether any retaliation claims could survive because the claim was barred by the statute of limitations. *Id.* at 411 n.4 and 412. In *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989), the Seventh Circuit again did not rule whether or not there was a retaliation claim, because plaintiff failed to meet his burden on summary judgment.

There is nothing about Battle's § 1981 claim which makes it worthy of this Court's review. Even if there were confusion or misapplication of *Patterson* by the various circuits courts -- which there clearly is not -- the passage of the Civil Rights Act of 1991 changed § 1981, rendering *Patterson* a nullity for cases filed after the effective date of the 1991 Act. Additionally, if Battle were "found to be outside the protections of Title VII," Pet. 34, he has only himself to blame because his claim was so stale that it was outside the statute of limitations -- a point he now concedes.

II. BATTLE HAS NO CONSPIRACY CLAIM UNDER 42 U.S.C. § 1985(3)

Battle's conspiracy claim under § 1985(3) is equally defective and unworthy of this Court's review. First, Battle's Title VII claim was dismissed with prejudice. If, as shown above, Battle's § 1981 claim was properly dismissed, then Battle has failed to establish *any* underlying civil rights violation. Therefore, Battle cannot maintain a claim that there was a conspiracy to deprive him of his civil rights and this case is moot.

Second, the district court dismissed Battle's § 1985(3) claim on the basis that Duke and the individual defendants could not conspire with each other. The district court also found that the complaint failed to allege any act by an individual employee outside the scope of his employment. Battle contends that, as a policy matter, the Supreme Court should abolish the intracorporate conspiracy doctrine in civil rights cases, although he fails to justify why the case law of almost all of the circuits should be overruled. Nor does he demonstrate the claimed "uncertainty" in the circuits' application of the doctrine. Pet. 47. Finally, Battle also contends that the lower courts misapplied the law of the Fourth Circuit to the facts of this case, Pet. 48-52, but that claim is unsupported by the allegations in his complaint.

A. Battle Cannot Maintain His Conspiracy Claim When There Has Been No Underlying Deprivation Of Civil Rights

Battle cannot maintain a cause of action for conspiracy because he cannot establish any underlying deprivation of his civil rights. Section 1985(3) provides an individual with the means to redress a conspiracy to deprive him of rights, but it provides no independent substantive rights. *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983). The rights, privileges and immunities that § 1985(3) vindicates must be found elsewhere. *Id.* Battle's § 1985(3) claim was predicated upon violations of § 1981 and Title VII,[11] both of which have been dismissed with prejudice.[12] Battle's failure to prove an underlying civil rights violation precludes a conspiracy claim predicated upon the same allegations. *Cassettari v.*

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[11] Assuming that Battle has no § 1981 claim, the § 1985(3) claim fails for the additional reason that Battle cannot sue for a conspiracy to deprive him of his rights under Title VII, because Title VII is his exclusive remedy. *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 442 U.S. 366, 378 (1979); *Doski v. M. Goldseker Co.*, 539 F.2d 1326, 1334 (4th Cir. 1976) ("§ 1985(3) is not an available mechanism to enforce rights created by Title VII"). *Novotny* explained that Congress created a remedial structure for Title VII which would be undermined if a party could simply bring a § 1985 claim based on the same facts. *Novotny*, 442 U.S. at 378.

[12] Nor can Battle argue, as he did before the district court, that the federal rights he seeks to protect are the privileges and immunities guaranteed by the Fourteenth Amendment. For that, Battle would need to allege state action, *Doski*, 539 F.2d at 1333, which he has not done and cannot do.

Nevada County, Cal., 824 F.2d 735, 739 (9th Cir. 1987) (affirming dismissal of conspiracy claim because the plaintiff's allegations were insufficient to state the underlying § 1983 claim); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 925 (5th Cir. 1977) (affirming dismissal of conspiracy claim because defendant's termination of bankrupt employee did not constitute a violation of civil rights); *see also Seguin v. City of Sterling Heights*, 968 F.2d 584, 590 (6th Cir. 1992) (affirming dismissal of conspiracy claim on ripeness grounds because the underlying claims were not ripe for review).

If all that remains of Battle's lawsuit is Count III, then the case is moot. Battle has abandoned his Title VII claim. If this Court agrees that *Patterson* precludes Battle's § 1981 claim, there will be no case or controversy under § 1985 because it would be "impossible for the court to grant 'any effectual relief whatsoever' to a prevailing party." *Church of Scientology of Cal. v. United States*, 113 S. Ct. 447, 449 (1992) (citations omitted).

B. The Supreme Court Should Not Discard The Intracorporate Conspiracy Doctrine

Despite Battle's sweeping statements to the contrary, almost all circuit courts recognize and apply the intracorporate conspiracy doctrine to civil rights cases when the individual employees or agents were

acting within the scope of their authority.[13] Those circuits recognize the general rule that a corporation is a single entity that acts through its agents, and, therefore, that a corporation cannot conspire with itself. However, those same courts, including the Fourth Circuit, also apply general agency principles and have created exceptions that provide, for example, that if the agent acted outside the scope of his authority, the doctrine does not apply. *See, e.g., Buschi v. Kirven*, 775 F.2d at 1252-53; *see also supra* n.13. Battle argues that, despite this majority rule,

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[13] *See, e.g., Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 840-41 (6th Cir. 1994) (intracorporate conspiracy doctrine prevents conspiracy claim in civil rights cases unless employees of corporation acted outside the scope of their employment), *cert. denied*, 115 S. Ct. 1698 (1995); *Buschi v. Kirven*, 775 F.2d 1240, 1252-53 (4th Cir. 1985) (intracorporate conspiracy doctrine bars claim for conspiracy unless agent's actions were unauthorized); *Stathos v. Bowden*, 728 F.2d 15, 21 (1st Cir. 1984) (doctrine only applies to ministerial acts of executives who carry out discretionary decision); *Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 430-31 (3d Cir. 1988) (corporation and its president cannot conspire together unless president acting in personal, not official, capacity); *Cross v. General Motors Corp.*, 721 F.2d 1152, 1156 (8th Cir. 1983) (corporation cannot conspire with its employees under § 1985(3) when acts of employee are arguably within the scope of employment), *cert. denied*, 466 U.S. 980 (1984); *Rice v. President and Fellows of Harvard College*, 663 F.2d 336, 338 (1st Cir. 1981) (defendants all part of same corporation, thus conspiracy claim properly dismissed), *cert. denied*, 456 U.S. 928 (1982); *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.) (employees acting in the scope of their employment cannot conspire with their corporation under § 1985), *cert. denied*, 439 U.S. 1003 (1978); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (if agents participated in corporate act, then not normally a conspiracy).

there is no policy reason to support the application of this doctrine to civil rights claims. That is not the case. Decisions regarding hiring, promotions, terminations, discipline and other employment decisions are often made by a group of individuals who are simply carrying out corporate policy and procedures. There is no logical reason to treat these corporate decisions any differently than marketing and pricing decisions that lead to antitrust claims. *See Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984) (reaffirming intracorporate conspiracy doctrine as it applies to the antitrust arena). Courts have already carved out appropriate exceptions, such as scope of employment, which address those instances which do not warrant the application of the doctrine. Battle has provided no justification for this Court to abolish the case law of the vast majority of the circuits.

Nor is there "confusion" in the circuits. Pet. 36. Battle cites -- as he did before the district court and the Fourth Circuit -- *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1258 (3d Cir. 1978), *vacated on other grounds, leaving issue open*, 442 U.S. 366, 372 n.11 (1979), as support for the purported rule that a corporation can conspire with its agents.[14] However, the corporation itself was not alleged to be a conspirator in *Novotny*, and both the Third Circuit, 584 F.2d at 1257-58, and this Court, 442 U.S. at 372 n.11,

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[14] Battle also cites *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594 (5th Cir. 1981). In that case, however, the court applied Louisiana, not federal, antitrust law, and held that that particular state law may allow a corporation to conspire with its agents. *Id.* at 604.

expressly declined to decide the intracorporate conspiracy question. In fact, the Third Circuit has since applied the intracorporate conspiracy doctrine to civil rights cases, noting that *Novotny* did not decide the issue. *See Robison*, 848 F.2d at 431.

Despite the supposed "confusion," there is only one circuit which has refused to apply the intracorporate conspiracy doctrine at all in civil rights cases. *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119 (10th Cir. 1994). Even if this Court were otherwise inclined to resolve this split of authority in the circuits, this would not be an appropriate case in which to do so because of the numerous other hurdles confronting petitioner such as waiver and mootness.

C. The Lower Courts Correctly Applied The Law In Dismissing Battle's § 1985 Claim

The Fourth Circuit first adopted the rule that agents and a corporation cannot conspire in *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974). In *Buschi*, 775 F.2d at 1252, the court extended the doctrine to civil rights cases. *See also Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1371 (4th Cir.) (police commissioner cannot, under § 1985(3), conspire with his own department to deprive employee of civil rights), *cert. denied*, 493 U.S. 850 (1989). The Fourth Circuit recognizes, however, that the doctrine may not apply

> where plaintiff has alleged that the corporate employees were dominated by

> personal motives or where their actions exceeded the bounds of their authority.

Buschi, 775 F.2d at 1252 (citations omitted); *see also Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 705 (4th Cir. 1991) (the personal stake exception cannot be broadened to "swallow the rule"), *cert. denied*, 502 U.S. 1074 (1992).

Because "Section 1985(3) requires a conspiracy 'of two or more persons,'" *Zombro*, 868 F.2d at 1371, and because Battle's only conspiracy claim was among Duke and its agents -- which is a single entity or person as a matter of law -- the district court dismissed Count III:

> "A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation."

A. 61-62 (quoting *Buschi*, 775 F.2d at 1251 (quoting *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953))). The district court also rejected Battle's argument that the individuals' acts were not authorized:

> A reading of plaintiff's complaint discloses, however, that the only act alleged on the part of any of the individuals named as defendants was President Brodie's communication of Battle's status as a member of the faculty. This hardly constitutes a

conspiracy. Count III must also be dismissed.

A. 62.

The district court was correct. Battle never pleaded facts showing that the actions of Brodie, Keller or Staelin were either unauthorized or that they had a dominant personal stake separate and apart from their employment capacity. In fact, with one exception, the alleged retaliatory acts are all attributable *solely* to Duke and not to Brodie, Keller or Staelin. J.A. 8-9, ¶¶ 22-25.[15] The only individual action referred to in the complaint is Brodie's alleged statement that Battle was leaving Duke. *Id.* at ¶ 24. Even if Brodie had made this statement, it can hardly be viewed as an overt act of a conspiracy. Commenting on the status of a faculty member is an action which is necessarily within the scope of Brodie's job and is not an example of an independent personal stake or an unauthorized act as required by *Buschi*. 775 F.2d at 1252. The district court properly dismissed Count III.

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[15] For the most part, the actions that Battle complains of, *e.g.*, moving his office and not announcing his promotion, relate simply to terms and conditions of the Agreement. Thus, there can be no question but that they were authorized.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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